[Cite as *State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm.*, 2012-Ohio-1371.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Honda of America Mfg., Inc.,	:	
Relator,	:	
v.	:	No. 11AP-65
Industrial Commission of Ohio and Clifford A. Ball,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 29, 2012

Vorys, Sater, Seymour and Pease LLP, Theodore P. Mattis and *Bethany R. Spain,* for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester,* for respondent Industrial Commission of Ohio.

Agee, Clymer, Mitchell & Laret, Robert M. Robinson, Eric B. Cameron, Katherine E. Ivan and *C. Russell Canestraro,* for respondent Clifford A. Ball.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Honda of America Mfg., Inc., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding permanent total disability ("PTD") compensation to respondent, Clifford A. Ball ("claimant") and to enter an order denying that compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings

of fact and conclusions of law, which is appended hereto. The magistrate found that the medical reports upon which the commission relied did not support the commission's grant of PTD compensation to the claimant. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus.

{¶ 3} The claimant has filed objections to the magistrate's decision. In his first objection, the claimant argues that relator did not timely object to the sufficiency of the medical evidence. We disagree.

{¶ 4} The record does not contain a transcript of the staff hearing officer's hearing. Therefore, there is nothing in the record to support the claimant's assertion that relator failed to challenge the sufficiency of the evidence. However, the record does reflect that relator specifically challenged the commission's reliance on the reports of Drs. Altic and Lowrey in its request for reconsideration. For these reasons, we overrule claimant's first objection.

{¶ 5} In his second objection, the claimant contends that the magistrate erred by reweighing the evidence presented to the commission. Again, we disagree.

{¶ 6} The magistrate simply examined the record to determine whether there was some evidence to support the commission's decision. The magistrate determined that the commission abused its discretion because the medical evidence relied upon by the commission did not support the grant of PTD compensation. Both Drs. Altic and Lowrey opined that the claimant was capable of sedentary work. Consequently, neither report constituted some evidence supporting the commission's decision. Consequently, we overrule the claimant's second objection.

{¶ 7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus and order the commission to enter a new order that adjudicates the PTD application in a manner consistent with the magistrate's decision.

Objections overruled;
writ of mandamus granted.

BROWN, P.J., and FRENCH, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Honda of America Mfg., Inc.,	:	
Relator,	:	
v.	:	No. 11AP-65
Industrial Commission of Ohio and Clifford A. Ball,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on November 17, 2011

Vorys, Sater, Seymour and Pease LLP, Theodore P. Mattis and *Bethany R. Spain,* for relator.

Michael DeWine, Attorney General, and *Cheryl J. Nester,* for respondent Industrial Commission of Ohio.

Agee, Clymer, Mitchell & Laret, Robert M. Robinson, Eric B. Cameron, Katherine E. Ivan and *C. Russell Canestraro,* for respondent Clifford A. Ball.

IN MANDAMUS

{¶ 8} In this original action relator, Honda of America Mfg., Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Clifford A. Ball ("claimant"), and to enter an order denying the compensation.

Findings of Fact:

{¶ 9} 1. On August 27, 2001, claimant injured his lower back while employed as an assembly line worker for relator, a self-insured employer under Ohio Workers' Compensation laws.

{¶ 10} 2. The industrial claim (No. 01-854453) is allowed for:

> Lumbosacral sprain/strain; sciatic neuritis; herniated nucleus pulposus L3-4 & L4-5; aggravation of pre-existing lumbar degenerative joint disease; lumbar stenosis at L4-5.

{¶ 11} 3. The record contains a "Physician's Report of Work Ability" (Medco-14) that was apparently completed by treating physician Stephen Altic, D.O. According to relator, this document is dated February 10, 2010. (Relator's brief, 5.) However, the table of contents of the stipulation of evidence indicates that the document is dated February 1, 2010. The document also contains a Honda stamp indicating that Honda received the document on February 11, 2010. There are two places on the Medco-14 where a date is supposed to be filled in. February 1, 2011 appears to be the handwritten date at one place. The other handwritten date is illegible. Relator asserts that Dr. Altic dated the Medco-14 on the same date of his typewritten office note of February 10, 2010. On the Medco-14, Dr. Altic indicated by his mark that claimant "[m]ay [return to work] with restrictions due to work-related injury."

{¶ 12} The Medco-14 asks the physician to respond to the preprinted query "Physician's further explanation of work abilities or why the injured worker is unable to perform any work." In the space provided on the form, Dr. Altic wrote in his hand "sedentary work."

{¶ 13} 4. On February 10, 2010, Dr. Altic authored the following office note:

> Plan: The patient is receiving social security disability under the federal government for his low back problems. I feel that

> he is likely permanently disabled under this claim as well. However, I would like a voc rehab evaluation on this gentleman to assess any potential for vocational activity. I think that that is unlikely, given the fact that he has significant problems in his back, had surgery, and certainly has social security disability for this as well. His condition is not likely to change. I have completed a Medco-14 for some restrictions, which indicate pretty much sedentary-type work. There is no point in doing an FCE because that is a waste of time and money and would likely be deleterious to Mr. Ball's health, and putting him through an FCE would likely make him significantly worse. There is no point in it on any rational level.
>
> Therefore, I am requesting the following via C-9:
>
> Vocational rehabilitation consultation with Medvopro, per patient request.

{¶ 14} 5. On March 30, 2010, claimant filed an application for PTD compensation. In support, claimant submitted the February 10, 2010 office note or report of Dr. Altic.

{¶ 15} 6. On May 19, 2010, at relator's request, claimant was examined by Kenneth A. Mankowski, D.O., who is board-certified in neurology and psychiatry. In his five-page narrative report dated June 1, 2010, Dr. Mankowski wrote:

> Mr. Ball is able to return to a sustained remunerative employment status with appropriate restrictions and limitations as outlined in the attached Occupational Activity Assessment form. In summary, he is not to lift greater than ten pounds, sit greater than five hours per work day, stand or walk greater than three hours per work day. He is not to climb stairs for greater than one-third of a work day. He is not to climb ladders. He is not to crouch, stoop or bend greater than one-third of the work day. He should not participate in lifting, pushing or pulling while kneeling.
>
> * * *
>
> The permanent impairment is primarily due to the previous lumbar spine surgeries performed as a result of the allowed conditions of this claim. The estimated impairment of the whole person is 8% as determined within table 15-3 of the Guides to the Evaluation of Permanent Impairment Fifth Edition. Pertinent data determining this Lumbar Category II

> classification includes: clinical history and examination findings of reduced range of motion of the lumbar spine and subjective evidence of radicular pain as a result of the allowed conditions and subsequent lumbar surgeries. No objective findings of radiculopathy or loss of structural integrity/stability of the lumbar spine.

{¶ 16} 7. On May 31, 2010, Dr. Mankowski completed a form captioned "Occupational Activity Assessment." On the form, Dr. Mankowski wrote in his own hand "Severe restriction of range of motion of the lumbar spine secondary to degenerative spine disorder and multiple surgeries."

{¶ 17} 8. On June 29, 2010, at the commission's request, claimant was examined by orthopedic surgeon Charles E. Lowrey, M.D. In his three-page narrative report, Dr. Lowrey opined:

> **DISCUSSION:**
> [One.] Has the injured worker reached maximum medical improvement with regard to each specified allowed condition? Yes, in my opinion, he has reached maximum medical improvement with regard to the allowed conditions of lumbosacral sprain/strain, sciatic neuritis, herniated nucleus pulposus at L3-L4 and L4-L5, aggravation of preexisting lumbar degenerative joint disease, and lumbar stenosis at L4-L5. My rationale is that the patient has had the problems treated adequately both with conservative treatment, pain management, and with surgical treatment including fusion and decompression at L3-L4 and L4-L5. He has had adequate time to recover from surgery and rehabilitate his back problems.
> [Two.] Based on AMA Guides Fifth Edition and with reference to the industrial commission medical examination manual, provide the estimated percentage of whole person impairment arising from each allowed condition. Please list each condition and whole person impairment separately and then provide a combined whole person impairment.
> I. Lumbosacral sprain/strain, 0% impairment.
> II. Sciatic neuritis, 10% impairment (DRE lumbar category III, table 15-3, page 384).
> III. Herniated nucleus pulposus at L3-L4 and L4-L5, 20% impairment (DRE lumbar category IV, table 15-3, page 384).

> IV. Aggravation of preexisting lumbar degenerative joint disease, 0% impairment.
> V. Lumbar stenosis at L4-L5, 0% impairment. Total impairment then is 30%.
> [Three.] Please complete the enclosed physical strength rating. In narrative, provide discussion setting forth physical limitation resulting from the allowed conditions. In my opinion, this patient has a 20-pound lifting restriction. He is unable to forward flex more than 20 to 30 degrees. He should avoid repetitive bending and stooping and is unable to climb or crawl.

{¶ 18} 9. On July 29, 2010, Dr. Lowrey completed a physical strength rating form. On the form, Dr. Lowrey indicated by his mark that claimant is capable of sedentary work.

{¶ 19} The form provides the definition of sedentary work provided at Ohio Adm.Code 4121-3-34(B)(2)(a):

> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶ 20} On the above definition, Dr. Lowrey crossed out the word "ten" that precedes the words "pounds of force occasionally." Above the crossed out word "ten" Dr. Lowrey wrote "20."

{¶ 21} The form asks the examining physician to note "[f]urther limitations, if indicated": in the space provided, Dr. Lowrey wrote in his own hand:

> No repetitive bending and stooping; do not bend greater than 30° forward.

{¶ 22} 10. Following an October 5, 2010 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation beginning June 10, 2010. The SHO's order explains:

> Permanent and total disability compensation is awarded from 06/10/2010 for the reason that it is the first medical evidence on file that supports a finding that the Injured Worker is permanently and totally disabled on a physical basis alone.
>
> Based upon the reports of Dr. Lowrey and Dr. Altic, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.
>
> On 02/10/2010, Dr. Stephen Altic opined the Injured Worker to be permanently and totally disabled as a result of the allowed physical conditions.
>
> The Injured Worker was examined by Charles Lowrey, M.D., on 06/10/2010, [sic] who estimated the Injured Worker to have a 30% permanent partial impairment. Dr. Lowrey related that the Injured Worker underwent a disc removal and fusion at the L3-L4 level in 2001, experienced significant improvement, and returned to his regular job, but with some restrictions for several years. Gradually, his back pain returned. On 04/10/2009, he underwent a second surgery at the L4-5 level with the removal of hardware and placement of a bone stimulator. The Injured Worker has experienced persistent pain in his lower back and into his left leg and foot since his last surgery. Dr. Lowrey concluded that the Injured Worker was capable of performing sedentary work, except with a twenty pound lifting limitation. He added that the Injured Worker would be "unable to flex more than 20 to 30 degrees" and experience "no repetitive bending and stooping" and "is unable to climb or crawl."
>
> It is found that the physical restrictions described by Dr. Lowrey equate to less than sedentary work. Particularly limiting is the Injured Worker's inability to forward flex more than 20 to 30 degrees. Considering the degenerative nature of his lumbar condition, it is expected that the Injured

> Worker's physical impairment will only increase over time. Based upon the foregoing findings, it is found that the Injured Worker's physical condition due to the allowed injuries prevents him from engaging in any sustained remunerative employment. Consequently, any attempt at vocational rehabilitation would be unsuccessful.

{¶ 23} 11. On December 3, 2010, the three-member commission mailed an order denying relator's request for reconsideration.

{¶ 24} 12. On January 20, 2011, relator, Honda of America Mfg., Inc., filed this mandamus action.

Conclusions of Law:

{¶ 25} Based upon the February 10, 2010 report of Dr. Altic and the June 29, 2010 report of Dr. Lowrey, the commission, through its SHO, determined that the medical impairment resulting from the allowed conditions in the claim prohibits claimant from performing any sustained remunerative employment, and that the nonmedical factors need not be considered. On that basis, the commission awarded PTD compensation starting June 10, 2010, a date that does not correspond to either report.

{¶ 26} Two issues are presented: (1) whether the February 10, 2010 report of Dr. Altic constitutes some evidence upon which the commission can rely to support its finding that the industrial injury alone prohibits all sustained remunerative employment, and (2) whether the June 29, 2010 report of Dr. Lowrey constitutes some evidence upon which the commission can rely to support its finding that the industrial injury alone prohibits sustained remunerative employment.

{¶ 27} The magistrate finds that neither report constitutes evidence upon which the commission can rely to support its determination that the industrial injury alone prohibits all sustained remunerative employment. Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 28} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

{¶ 29} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(D)(2)(a) provides:

> If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors * * *.

{¶ 30} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions or fails to clarify an ambiguous statement. Id.

{¶ 31} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.,* 69 Ohio St.3d 445, 449, 1994-Ohio-458; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585.

{¶ 32} Analysis begins with a report of Dr. Altic. The SHO's order of October 5, 2010 states that Dr. Altic opined claimant "to be permanently and totally disabled as a result of the allowed physical conditions." However, a closer reading of the report indicates that Dr. Altic actually stated "I feel that he is likely permanently disabled under this claim as well." Dr. Altic did not say that claimant was permanently and totally disabled. That is, the word "totally" does not appear between the words "permanently"

and "disabled" in the report. Thus, it appears that the SHO misread what Dr. Altic actually wrote.

{¶ 33} However, given the reference to "social security disability" in the same sentence, it is perhaps arguable that Dr. Altic meant to say "permanently totally disabled." In any event, this court need not resolve the question of whether the words "permanently disabled" can be read to mean "permanently totally disabled."

{¶ 34} There are at least two reasons why Dr. Altic's February 10, 2010 report cannot be read as presenting an opinion that claimant is permanently and totally disabled as a result of the industrial injury alone. The first reason, and the stronger of the two, is that Dr. Altic states that the Medco-14 he had completed "indicate[s] pretty much sedentary-type work." Obviously, if Dr. Altic believes claimant is medically capable of sedentary work, he cannot opine that relator is permanently and totally disabled as a result of the allowed conditions alone.

{¶ 35} The second reason is that Dr. Altic recommends a vocational rehabilitation evaluation "to assess any potential for vocational activity." A recommendation that claimant undergo a vocational rehabilitation evaluation is inconsistent with an opinion that the industrial injury alone prohibits all sustained remunerative employment, because, if claimant is permanently totally disabled, a vocational evaluation would be a futile endeavor.

{¶ 36} As claimant points out in this action, Dr. Altic follows his statement that he "would like a voc rehab evaluation" with the statement that he thinks it is "unlikely" claimant actually has vocational potential. According to claimant here, Dr. Altic "was simply being thorough, and leaving no stone unturned." (Claimant's brief, 4.) Nevertheless, the recommendation to obtain a vocational rehabilitation evaluation, with

the caveat that vocational potential is unlikely, can be construed as an expression of uncertainty as to whether claimant is actually permanently and totally disabled by the industrial injury alone.

{¶ 37} Clearly, based upon the above analysis, Dr. Altic's report cannot be construed as providing a medical opinion that claimant is permanently and totally disabled as a result of the industrial injury alone. Moreover, Dr. Altic's report need not be found to be equivocal or internally inconsistent to reach the conclusion that the report provides no evidence that claimant is permanently and totally disabled as a result of the industrial injury alone.

{¶ 38} Again, Dr. Altic's statement that his Medco-14 restriction "indicate[s] pretty much sedentary-type work" cannot be ignored by the commission or deleted from the report. The commission clearly abused its discretion by its reliance upon the report to support a finding that claimant is permanently and totally disabled by the industrial injury alone.

{¶ 39} Analysis continues with the report of Dr. Lowrey.

{¶ 40} On the physical strength rating form, Dr. Lowrey opines that claimant is capable of sedentary work, albeit with only a 20-pound lifting restriction rather than the standard 10-pound restriction associated with the definition of sedentary work. In his three-page narrative report, Dr. Lowrey opines that claimant's total impairment is 30 percent. Dr. Lowrey further opines:

> [T]his patient has a 20-pound lifting restriction. He is unable to forward flex more than 20 to 30 degrees. He should avoid repetitive bending and stooping and is unable to climb or crawl.

{¶ 41} Nowhere in his report does Dr. Lowrey conclude or opine that the restrictions prohibit claimant from performing sustained remunerative employment or that

the restrictions render claimant permanently and totally disabled as a result of the industrial injury alone. How then can it be said that Dr. Lowrey's report supports the commission's determination that claimant is permanently and totally disabled solely as a result of the allowed conditions in the industrial claim?

{¶ 42} Despite Dr. Lowrey's opinion that claimant is capable of sedentary work (albeit with a 20-pound lifting restriction) the SHO himself weighed Dr. Lowrey's stated medical findings and restrictions and concluded on his own that those medical findings and restrictions indicate an inability to perform all sustained remunerative employment. Thus, it was the SHO himself who offered the medical opinion that claimant is unable to perform sustained remunerative employment as a result of the industrial injury alone. This was an abuse of discretion by the SHO.

{¶ 43} It can be further noted that the medical conclusion that the SHO himself extracted from the clinical findings in Dr. Lowrey's report contradicts the medical conclusion of Dr. Lowrey regarding the clinical findings.

{¶ 44} It is well-settled that the commission and its hearing officers do not have medical expertise. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.,* 81 Ohio St.3d 56, 1998-Ohio-654.

{¶ 45} Clearly, the commission has no authority or expertise to draw a medical opinion from Dr. Lowrey's report that contradicts the medical opinion of Dr. Lowrey that he drew from the clinical findings reported. See *State ex rel. Cleveland Clinic Found. v. Indus. Comm.,* 10th Dist. No. 10AP-329, 2011-Ohio-2269.

{¶ 46} In short, Dr. Lowrey's report does not constitute evidence upon which the commission can rely to support a finding that the industrial injury alone prohibits all sustained remunerative employment.

{¶ 47} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the SHO's order of October 5, 2010 that awards PTD compensation, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).